EDITORIAL NOTES.

By W. D. L.

THE NEW CIRCUIT COURTS OF APPEAL.

The nomination by the President of seven out of the nine judges of the new Circuit Courts of Appeal is an event of no little importance to the bar and to the country. We, as yet, scarcely realize the part which these new courts are destined so play in the development of private law in the United States. The primary object of the act was to relieve the Supreme Court. While there is, undoubtedly, a steady decrease in the relative amount of litigation, the rapid growth of our country threw upon the Supreme Court, under the old rules of appeal, such a volume of business that the deliberation necessary to insure the permanent value of its work was rapidly becoming impossible. Latterly the most potent factor in the increase of the business of the Supreme Court was the delay attendant on an appeal, and this delay increased the advantage of an appeal to the defendant against whom an adverse decision had been rendered. One cause thus reacted on the other, the increase in the work of the court increased the delay, and the delay increased the work. Relief was essential. And on the passage of the act by the last Congress, the fact that this relief had been secured, not the importance of the tribunals which had been created, was uppermost in the minds of the profession.

We now, however, have had time to realize that practically all those cases in which the decision involves the application or the further development of the common law will hereafter be brought into these new courts for what, in most cases, means final revision. The interpretation of the laws of the several States, as far as the jurisdiction of the Federal Courts renders such interpretation necessary, also devolves upon the Circuit Courts of Appeal. To them is

given the final interpretation of the patent laws, criminal laws and revenue laws of Congress, together with the decision in Admiralty cases.

Under their review, though with a right to an appeal to the Supreme Court, pass all cases involving the interpretation of the laws of Congress, excepting always where the constitutionality of the law is drawn in question. In that event the case, as all other constitutional cases, passes directly from the Circuit or District Court in which it arose to the Supreme Court of the United States.

As far as the Federal Courts are concerned, with the exception of international law which depends upon the construction of treaties of the United States, and of the law involved in the decision of a "prize cause," the new courts have almost as wide a jurisdiction, and can affect as profoundly the development of law in this country, as the High Court of Justice in England. What is left to the Supreme Court of the United States is that body of Consitutional Law which embraces the relations of the individual citizen to the local and central governments, and the relations of these governments to each other, together with the comparatively unimportant duty of interpreting the statutes passed by Congress, with the exceptions above noted.

Besides establishing nine new courts whose importance can hardly be estimated, the act introduces a distinctly new feature into our system of appeals. Decrees of the Court of Appeals are made final in the cases mentioned, only on condition that the Supreme Court permits them to be final. The parties in the cause cannot appeal as a matter of right. The appellate court is itself made the sole judge of the expediency of the appeal, except that the members of the Court of Appeals have the right to certify to the Supreme Court any question of law on which they desire the instructions of the Superior Court.

The principle that the members of the appellate court should be the judges of the right of appeal, is a distinct step in advance, because it is a recognition of new conditions and an attempt to adjust ourselves to them.

As long as the nation was comparatively small, and the number of litigated cases was insignificant, the custom of allowing a certain amount of money to be the sole factor in determining whether a case should be appealed to the one Supreme Court for authoritative revision produced excellent results. It gave an unity to Federal law, and the delays of appeal were not so great as to defeat the ends of justice. This mechanism enabled the courts to deliver opinions with reasonable promptitude on unsettled questions of law, and thus the law on any point would be finally determined, and not left in doubt for an indefinite period. But with our growth as a nation this old mechanism is evidently unsuitable. Allowing the counsel in the causes to be the sole judges of the expediency of an appeal chokes the appellate courts with cases which involve no new principle of law, and only serves to delay indefinitely the discussion of cases upon which the profession may feel a reasonable doubt. Appellate courts were rapidly coming to a point where they were doing more harm, by delaying the execution of the just decrees of the lower courts, than good in elucidating the law.

The change in the mechanism by which a case is appealed to a final tribunal, if it proves satisfactory in practice, will have a much wider effect than simply to relieve the Supreme Court of the United States and improve the efficiency of the Federal Courts. The development of law in the United States and the interpretation of the local State statutes, at present, labor under a twofold disadvantage, which springs practically from the same source. We have forty-odd States, each with its Supreme Court, each interpreting its own statutes and the principles of common law to suit itself. On the other hand, the Federal Courts, having frequently to interpret the statutes of the various States, often take the liberty of construing them in such a way that their practical effect is totally different from that given to them by the courts of the State. Sooner or later this confusion will become intolerable, and then the fact that it is possible, in spite of the great amount of litigation, to have one Supreme Court, where the court itself is made the

judge of the advisability of the appeal, and that practically all the advantages of the appellate court are retained, may be the determining factor which will lead to a practical consolidation of the State and Federal Judiciary.

IN RE LAU OW BEW, PETITIONER.

The case of Lau Ow Bew, petitioner, decided by the Supreme Court on the 16th of last November,[1] is the first case which involves the construction of Section 6 of the act establishing the new Circuit Courts of Appeal. This section provides that the judges of the Courts of Appeal, in cases where their judgment would otherwise be final, may certify questions of law to the Supreme Court, or that the Supreme Court on petition may issue a writ of *certiorari* to have the entire record brought before them. The facts of the case also suggested an interesting question as to the jurisdiction of the new Circuit Courts of Appeal, as also the proper construction of the Chinese Exclusion Acts.[2]

It seems that the petitioner, Lau Ow Bew, was a natural-born subject of the Emperor of China. For the past seventeen years he had been a resident of the United States. He was, or rather is, a merchant in the city of Portland, Oregon, having a one-fourth interest in a firm which does over $100,000 worth of business annually. In September, 1890, he left the United States on a temporary visit to China. On the eleventh day of last August he arrived on his return voyage in San Francisco. The Collector of the Port refused to allow him to land, on the ground that, although before leaving he had procured satisfactory evidence of his status as a merchant, according to the regulations in that respect of the Treasury Department (which proofs he produced to the satisfaction of the Collector), and although he

[1] Reported in p. 583, Vol. 142, of the United States Supreme Court Reports.

[2] An act to execute certain treaty stipulations relating to Chinese, approved May 6, 1882, 22 Stat., 58, c. 126, as amended July 5, 1884, 23 Stat., 115, c. 220.

was entitled to protection under the treaties between our Government and China, he had failed to comply with the sixth section of the Act of Congress last above mentioned. This section provides: "That every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government or such other foreign government of which at the time such Chinese person shall be subject." The treaty referred to is the one of November 17, 1880, which provided that Chinese, other than laborers, should have the right, without conditions or restrictions, to come, remain in, and leave the United States, and enjoy all privileges, immunities and exemptions enjoyed by the citizens of the United States in China. The Collector of the Port remanded Lau Ow Bew to the custody of the captain of the ship on which he had arrived. He was brought before the Circuit Court on a writ of *habeas corpus*. The Circuit Court dismissed the petition, and remanded the petitioner to custody. From this judgment an appeal was presented to the Circuit Court of Appeals for the Ninth Circuit. That Court sustained the ruling of the Circuit Court, and refused to certify any question of law to the Supreme Court. Whereupon a petition was filed in the Supreme Court for a writ of *certiorari*.

The case in the Circuit Court had been decided on the ruling of the Supreme Court in Wan Sing *v.* United States,[1] in which it was held that one who came to this country at the age of 16, remained two years, and then returned to China, where he passed seven years, was required to bring certificates of identification from the Government of China. The Supreme Court in the present case decided that the decision relied on by the Circuit Court presented such a different state of facts that it could not be said to rule the present case; and as the present case involved the construction of a statute, whose true meaning must be determined by reading it in the light of our treaties with

[1] 140 U. S., 424.

China, and of the principles of international law, it was a question of importance which should have been certified to the Supreme Court, and, therefore, the Court granted the petition for a writ of *certiorari* to bring the record of the case before them. Chief Justice FULLER, in the concluding sentence of the opinion, says: "While, therefore, this branch of our jurisdiction should be exercised sparingly and with great caution, we are of the opinion that the ground of this application is sufficient to call for our interposition."

It is by no means certain that the Court of Appeals had jurisdiction of the case. In fact, the Supreme Court only assumes the jurisdiction "for the purposes of the present discussion." The fifth section of the act establishing the Circuit Courts of Appeal provides: "That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to h e Supreme Court in the following cases:

"In any case in which the constitutionality of any law of the United States, or the validity or *construction* of any treaty made under its authority is drawn in question."

The sixth section of the act deprives the Circuit Courts of Appeal of jurisdiction in all cases which may be taken direct to the Supreme Court.

The piece of legislation which is called in question is, it is true, an Act of Congress, and as such should be considered by the Courts of Appeal. But the act was passed, ostensibly, at least, to carry out the provisions of a treaty, and certainly must be interpreted in the light of that treaty. Whether it is ultimately decided that similar cases should go direct from the Circuit Court to the Supreme Court, or that the Circuit Courts of Appeal have jurisdiction, no one can doubt, in the light of the decision in Lau Ow Bew, the convenience of the former method. For if the rule is to be followed, that every case which involves indirectly the construction of a treaty is of sufficient importance to be certified to the Supreme Court, it would greatly expedite a final decision of the cause to take the case directly to that court, which alone can give a final

decision. The intervention of any other court is practically worse than useless. It simply multiplies tribunals.

The true construction of the treaties with China and the Restriction Acts as applied to the facts of this case, which will soon receive authoritative exposition by the Supreme Court, is one involved in considerable doubt. The treaty of 1880 provides that Chinese, other than laborers, may come and go to the United States as the citizens of any other nation. The Restriction Act of 1884 was evidently passed in good faith to carry out the true intent of this treaty. This intent is set forth in its opening paragraph:

"Whereas in the opinion of the Government of the United States the coming of Chinese *laborers* to this country endangers the good order of certain localities, etc." Laborers who are within the United States ninety days subsequent to the adoption of the treaty are permitted to return to China or elsewhere on business or pleasure, and subsequently to re-enter the United States.

For the purpose of their identification the fourth section of the act provides that, on leaving the United States, they may obtain a certificate from the Collector of the Port, which certificate on their return identifies them and establishes their right to re-enter our country. No permission or identification on the part of the Chinese Government is required. Such identification as applied to persons who have a right to enter the country because of their previous residence would be useless. The purpose of the identification provided for in the sixth section of the act is to enable the Collector to determine whether the person seeking admission for the first time is a merchant. It is evident that the framers of the law never contemplated the case of a Chinese merchant resident in the United States desiring to visit his native country. To ask him to obtain identification as a merchant from the Government of China is absurd. On the other hand, the terms of the act providing a method of identification of Chinese who have left this country for a short time is confined by the terms of the act to Chinese *laborers*. Either, therefore, there is no necessity for the identifica-

tion of merchants returning to China, or the proofs required are impossible and absurd. We incline very strongly to the first alternative, adding this proviso: That the Collector of the Port, as an executive officer, has a right to demand of returning merchants a reasonable proof that they are merchants resident in the United States. For this there can be no more satisfactory method than the one required by Congress in the case of returning laborers, and this Lau Ow Bew is in a position to furnish.

BOOK REVIEWS.

By G. W. P.

A TREATISE ON THE LAW OF PERSONAL PROPERTY. By JOSEPH J. DARLINGTON, LL.D., of Georgetown University of Law. Founded on the Treatise of Joshua Williams, Esq. Philadelphia: T. & J. W. Johnson & Co., 1891.

The reader of this valuable work will find it a task of no little difficulty to give honor where honor is due, for it represents in text and in notes the learning and literary skill of both Mr. Williams and Mr. Darlington, while it contains a considerable number of the notes to the fourth edition of Williams on Personal Property by the American editors of that edition, Messrs. Gerhard and Wetherill. The chapter on "Ships" is by Martin F. Morris, LL.D., while Robert G. Dyrenforth, LL.D., contributes the chapter on "Patents, Trade-marks and Copyrights." It is, in fact, as Mr. Darlington states in his preface, Williams on Personal Property *minus* so much of the original text as is inapplicable in the United States, *plus* a further presentation, upon the latest English and American authorities, of topics treated in the retained text, together with sundry subjects of importance not therein discussed. The formula for determining the authorship of any given passage is thus stated in the preface: "Every paragraph of the following

[1] 40 Fed. Rep., 433.